

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VERNON J. TUSH)	
Claimant)	
VS.)	
)	Docket No. 245,152
B-3 CONSTRUCTION, INC.)	
Respondent)	
AND)	
)	
CREDIT GENERAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed Administrative Law Judge Steven J. Howard's February 3, 2000, preliminary hearing Order.

ISSUES

In his brief, claimant starts out discussing an alleged work injury to his back and a work-related hiatal hernia. But the arguments that follow in the brief only relate to the compensability of the back injury and not the hiatal hernia. Further, the respondent, in its brief, contends it understood claimant had abandoned any claim for the hiatal hernia and resulting gastroesophageal reflux disease. Additionally, in the preliminary hearing transcript, the Administrative Law Judge described the single issue as "claimant's requesting medical treatment for his alleged back condition" ¹ Accordingly, the Appeals Board concludes the issues raised by the claimant are related only to claimant's alleged back injury and not to his hiatal hernia.

The Administrative Law Judge denied claimant's request for medical treatment for an alleged work-related back injury. The Administrative Law Judge found claimant had failed to prove his back injury was related to his employment with respondent.

¹ January 27, 2000, preliminary hearing transcript, p. 3.

Furthermore, the Administrative Law Judge found claimant failed to provide respondent with timely notice of the alleged work-related accident.

On appeal, the claimant contends he proved the heavy repetitive work activities that he was required to perform while employed by the respondent caused his back injury. Also, claimant argues he timely notified respondent's owners, Robert D. and Mary Pat Burgan, that he injured his back at work. The claimant requests the Appeals Board to reverse the Administrative Law Judge's preliminary hearing Order and order the respondent to provide claimant medical treatment for his back injury.

Respondent requests the Appeals Board to affirm the preliminary hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record, together with the exhibits admitted into evidence and the briefs of the parties, the Appeals Board finds the preliminary hearing Order should be affirmed.

Claimant testified he injured his back while operating a bagel cutting machine for the respondent sometime on or about March 1, 1999. Claimant's job duties required him to place large tractor tires into the cutting machine on a repetitive basis. After the tires were cut into pieces, claimant was then required to take the pieces from the cutting machine and place the pieces into a stack.

Sometime around March 1, 1999, claimant alleges he slipped on some ice and fell as he was attempting to pull a tire through the cutting machine. The fall resulted in injuries to his upper back and shoulders. Further, claimant testified, as he continued to work, his back symptoms worsened. Claimant also testified he notified respondent's owner, Robert D. Burgan, within seven days of the accident, ". . . my back is killing me, I said I think I need to see a chiropractor or something."²

This case is complicated by the fact that claimant was diagnosed and treated for an hiatal hernia causing gastroesophageal reflux disease before and during the same time period he alleged he injured his back at work. The medical treatment records admitted into the preliminary hearing record indicate claimant was first treated for the hiatal hernia condition on July 12, 1998. On that date, claimant went to a local hospital's emergency room in Miami, Oklahoma, because of severe abdominal pain, vomiting, and diarrhea. He was admitted and remained in the hospital overnight.

After claimant's release, he was seen by a local physician, Mark Osborn, M.D. Dr. Osborn took claimant off work for two weeks and placed him on medications.

²January 27, 2000, preliminary hearing transcript, p. 6.

The next medical treatment record indicates claimant was seen in Joplin, Missouri, by Alan M. Buchele, M.D., on March 17, 1999. Dr. Buchele's impression was probable gastroesophageal reflux disease with an element of esophagitis. At that examination, Dr. Buchele's medical note indicates claimant denied any musculoskeletal pain despite his heavy work.

Dr. Buchele saw claimant again on April 7, 1999. The doctor's impression was frank gastroesophageal reflux disease associated with a hiatal hernia. Claimant was then referred to gastroenterologist, David A. Seidl, M.D.

Dr. Seidl also saw claimant on April 7, 1999. After he examined claimant, Dr. Seidl's impression was significant gastroesophageal reflux disease and regurgitation. Claimant was continued on medication and an upper endoscopy was recommended.

In a letter dated May 14, 1999, Dr. Seidl replied to an inquiry from respondent's insurance carrier concerning questions relating to claimant's hiatal hernia condition. Dr. Seidl diagnosed claimant with an underlying condition of gastroesophageal reflux disease caused from a hiatal hernia. The doctor opined it was doubtful claimant's job caused the hiatal hernia. But it is not surprising that claimant's heavy lifting activities would exacerbate the gastroesophageal reflux disease caused by the underlying hiatal hernia.

Claimant contends he had an initial back injury at work sometime on or about March 1, 1999. His back symptoms then worsened as he continued to work. Because of the back injury, he was taken off work for about a month and returned to work sometime around March 11, 1999. The record is not clear, but claimant left work allegedly because of his back injury either at the end of March or sometime in June, 1999.

After claimant left his employment with respondent, claimant's attorney had claimant examined and evaluated, on June 23, 1999, by Brian K. Ellefsen, D.O., of Carthage, Missouri. The results of Dr. Ellefsen's examination are contained in a report admitted into evidence dated June 23, 1999. This report relates a history given by claimant to the doctor that describes a work-related accident occurring in June of 1998. The doctor diagnosed claimant with thoracic sprain/strain. He recommended claimant be placed on anti-inflammatories, muscle relaxants, pain medication, and physical therapy. The doctor restricted claimant's activities to avoid any forceful pushing or pulling and no lifting greater than 15 pounds regularly and 25 pounds occasionally.

Before the January 27, 2000, preliminary hearing, the Administrative Law Judge ordered claimant to undergo an independent medical examination. On November 5, 1999, claimant was examined and evaluated by orthopedic surgeon, Theodore L. Sandow, Jr., M.D. Dr. Sandow's medical report, dated November 5, 1999, was admitted into evidence at the preliminary hearing. His report contains a history given by claimant that he injured his back at work when he slipped while operating the bagel cutter approximately two years ago. The doctor found claimant's symptoms suggested nerve root

irritation but there was no objective evidence to support the diagnosis. Dr. Sandow, however, did feel the claimant would benefit from physical therapy and anti-inflammatory medication. He limited claimant's work activities to a maximum lift of 35 pounds with avoidance of repetitive pushing, pulling and reaching.

Both Robert D. Burgan and his wife, Mary Pat Burgan, also testified in person before the Administrative Law Judge. Both denied claimant had notified them in March 1999 that he had injured his back in a fall at work. They acknowledged that claimant had other health problems and had missed some work during this period. But they denied claimant had given them notice he was making a claim for a work-related back injury until a claim was received in May 1999. They did acknowledge they knew claimant had been treated for a hiatal hernia and related problems in March of 1999.

In fact, on March 16, 1999, claimant notified both Robert and Mary Pat Burgan that he had been hospitalized because of his hiatal hernia and the doctor told him to inquire of his employer about workers compensation coverage. At that time, Ms. Burgan made out an accident report and notified their workers compensation insurance carrier that claimant was claiming his hiatal hernia was related to his work activities. But both of the owners testified claimant, at that time, never claimed he fell at work and injured his back. Additionally, Ms. Burgan testified claimant had not been off work for a month in March 1999 as alleged by the claimant. The only time claimant had been off work for a month was in July 1998 when he had an episode with his gastroesophageal reflux disease.

Claimant's testimony conflicts not only with the medical treatment records but also with the testimony of respondent's owners, Robert and Mary Pat Burgan. Claimant contends he told all the physicians that treated him for his gastroesophageal reflux disease that he had also injured his back at work. But none of those physicians' medical records indicated claimant had made complaints of back pain. In fact, Dr. Alan M. Buchele's March 17, 1999, medical record indicates claimant denied any musculoskeletal pain despite his heavy work activities. Furthermore, although claimant's description of the alleged work-related accident was consistent in both Dr. Ellefsen's and Dr. Sandow's medical reports, the time period the accident occurred was not. Dr. Ellefsen's medical report indicated the accident occurred in June 1998, where Dr. Sandow's medical report indicated the accident occurred approximately two years ago. In contrast, claimant alleges the accident occurred in March 1999.

Due to the conflicting testimony and the inconsistent histories claimant provided both his treating and examining physicians, claimant's credibility becomes an important issue. Because the Administrative Law Judge denied claimant medical treatment for his alleged back injury, he apparently found claimant was not a credible witness. In weighing the evidence and considering the credibility of the witnesses, the Appeals Board takes into consideration the Administrative Law Judge's opportunity to observe the witnesses testify. The Administrative Law Judge had the unique opportunity to judge their demeanor and assess their credibility. Accordingly, the Appeals Board takes into consideration the

Administrative Law Judge's finding in this regard. Giving some deference to the conclusions of the Administrative Law Judge and based upon the review of the record as a whole, the Appeals Board finds the evidence supports the conclusion that claimant failed to prove his back injury arose out of and in the course of his employment and claimant failed to provide respondent with timely notice of the alleged accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Steven J. Howard's February 3, 2000, preliminary hearing Order should be, and it is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

c: William L. Phalen, Pittsburg, KS
John B. Rathmel, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director